

BEFORE THE
APPEALS AND VARIANCE HEARING OFFICER
DRAPER CITY, STATE OF UTAH

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SEP 12 2016

Div. of Oil, Gas & Mining

IN THE MATTER OF:**APPEAL APPLICATION OF:**

JASON PORTER RICKABAUGH,
ADRIAN DYBWAD,
MICHAEL NIEDERHAUSER and
CATHERINE NIEDERHAUSER,

Applicants/Appellants,
Appeal Application VA-000198-2016

Being an appeal of the
Zoning Administrator's determination of the
Geneva Rock Products, Inc.
Administrative Interpretation
Application VA-000137-2016

regarding:

15547 Minuteman Drive
Draper, Utah 84020
(Approximate Property Address)

ORDER ON HEARING

(Administrative Appeal Hearing)

(Draper City Code: Sec. 9-4-180.D.4
"Appeal Hearing")

Mark E. Kleinfeld,
Hearing Officer

STATEMENT OF THE CASE

This matter came on to be heard before the Draper Appeals and Variance Hearing Officer on August 16, 2016 at 10:00 o'clock A. M. Mountain Time, with Mark E. Kleinfeld serving as Hearing Officer.

Said hearing being held at the Draper City offices located at 1020 East Pioneer Road, Draper, Utah 84020, having been convened at the designated time of 10:00 (10:04) A. M., August 16, 2016 and adjourned at 12:28 P. M. on said same day.

Appearances:

Jason Porter Rickabaugh, Applicant and Appellant.

Adrian Dybwad, Applicant and Appellant.

Michael Niederhauser, Applicant and Appellant.

Catherine Niederhauser, Applicant and Appellant.

Keith Morey, Community Development Director/Zoning Administrator, Draper City, 1020 East Pioneer Road, Draper, Utah 84020.

Michael G. Barker, City Attorney, Draper City, 1020 East Pioneer Road, Draper, Utah 84020.

Bruce R. Baird, Attorney At Law, Attorney for Geneva Rock Products, Inc., 2150 South 1300 East, Suite 500, Salt Lake City, Utah 84106.

By the Presiding Officer:

Pursuant to Appellants' July 5, 2016 appeal application an Administrative Appeal Hearing was conducted on August 16, 2016 in the above-entitled proceeding.

The Appellants were present at that time.

The hearing was convened and conducted in accordance with Section 9-5-180.D.4 of the Draper City Code ("DCC").

ISSUE, BURDEN and "STANDARD OF REVIEW"

1. The basic issue in this matter is: "Should Draper City's June 24, 2016 *"Administrative Interpretation"* as to nonconforming use status of Geneva Rock Products, Inc.'s use of the real property located at the approximate address of 15547 Minuteman Drive, Draper, Utah 84020 be affirmed, reversed or modified, in whole or in part?" (Section 9-5-180.D.4, DCC).

2. The *"burden of going forward"* in this matter as to the above issue is on the Appellants.

3. As to the above and foregoing "issue" or "question" to be answered the *"standard of review"* is that of *"correctness"* of the lower decision. (Section 9-5-180.D.4, DCC).

Oral argument was offered and received.

The Appeals and Variance Hearing Officer being fully advised in the premises and taking administrative notice of the files and records of Draper City in the instant matter, now enters his *Findings of Fact, Conclusions of Law, and Order*, as follows:

FINDINGS OF FACT

I, find by a preponderance of the evidence, the following facts:

Preliminary-Jurisdictional Facts

1. Draper City ("City") is a municipal corporation and political subdivision of the State of Utah. Draper City is empowered to administer and enforce the Draper City Code "Code" or "DCC"), including Title 9, "*Land Use Development and Regulations*" and more specifically Sections 9-5-130 "*Nonconforming Uses*" and 9-5-170, "*Administrative Interpretations*".

2. The Administrative interpretation and appeal process is created and empowered under Chapter 9-5, "*Administrative and Development Review Procedures*" of the Draper City Code and authorizes the issuance of administrative interpretations and appeals therefrom.

3. On May 9, 2016 Geneva Rock Products, Inc. ("*Geneva*") filed its application for administrative interpretation concerning certain property within Draper City located at the approximate address of 15547 Minuteman Drive, Draper, Utah 84020 requesting a determination of the existence of a nonconforming use. Such application being designated as Application **VA-000137-2016** by the City

4. The Appellants during the course of the City's Zoning Administrator review of the Geneva application filed various documents, photographs and or written positions in opposition to a determination of nonconforming use status for the Geneva property.

5. Geneva on June 17, 2016 filed a 3 page *supplement* to its original May 9, 2016 filing.

6. The Zoning Administrator on June 24, 2016 issued his decision concerning the Geneva application determining the existence of a nonconforming use.

7. The Appellants filed their timely application for appeal on July 5, 2016. Such application being designated as Application **VA-000198-2016** by the City

8. That based on the preliminary facts as set forth in Paragraphs 1 through 7, immediately above, the Hearing Officer set Tuesday, August 16, 2016 at 10:00 A. M. at the Draper City Offices at 1020 East Pioneer Road, Draper, Utah 84020 as the time and place for the appellate review hearing.

DISCUSSION-ANALYSIS

All three parties, Appellants, the City and Geneva in large measure concur as to the basic chronology of the present circumstance.

It is the interpretation and impact of the physical facts and status of the subject premises that is at the heart of the present situation.

It would not be too extreme to utilize the phrase “*diametrically opposed*” as to what two of the parties, Appellants and Geneva maintain in their respective positions as to what the status of the premises were, are or should be determined to be.

It is the third party, the City, in some sense that is placed in the middle between the other two.

The question(s) presented is:

Should Draper City’s June 24, 2016 “*Administrative Interpretation*” as to nonconforming use status of Geneva Rock Products, Inc.’s use of the real property located at the approximate address of 15547 Minuteman Drive, Draper, Utah 84020 be affirmed, reversed or modified, in whole or in part? (Section 9-5-180.D.4, DCC).

Primary Applicable Pertinent (State Statutes,) Municipal Code Sections and Judicial Precedents are as follows (although others may be otherwise specifically cited within the body of this “Order on Hearing”):

Section 9-4-050: Appeals and Variance Hearing Officer.

Section 9-5-130: Nonconforming Uses.

Section 9-5-170: Administrative Interpretations.

Section 9-5-180: Appeal of Administrative Decisions.

Section 9-6-010: Purpose.

Section 9-6-020: Scope.

Section 9-6-040: Nonconforming Uses.

Section 9-6-090: Abandonment.

Section 9-6-100: Determination of Nonconforming Status.

9-6-140: Appeals.

Gibbons & Reed v. North Salt Lake City, 19 Utah 329, 431 P.2d 559 (Utah 1967).

After one works through the stockpile of voluminous documents, photographs and materials that is the record what one is left with boils down to the need for a hopefully common sense application of property, municipal and land use planning law.

Acknowledging such is easier said than done what is needed is a starting point or ***standard of review*** to be established.

Draper City Code Subsection 9-5-180.D.4 which reads in part "[t]he (appellate body) [Appeals and Variance Hearing Officer] shall determine the **correctness** of the lower decision, " establishes that standard and starting point. (EMPHASIS ADDED.)

Such legislative statement by the Draper City Council creates a *presumption of correctness* of the lower decision, **IF** such was based on a "reasonableness" review of the facts established by the evidence in the record.

The presumption of correctness may be rebutted by competent *credible evidence in the record*.

This the Appellants in a fashion attempted to do during the Zoning Administrator's deliberations in their providing numerous documents, photographs and written arguments as to in their opinion why the Geneva property should not be determined to have nonconforming use status.

Much of what Appellants present on appeal would appear to be a re-statement of their points presented during the initial decision making process.

The Appellants present four (4) main points on appeal, namely:

1. Geneva Rock did not provide sufficient evidence for the determination of nonconforming use.
2. Expansion of nonconforming use.
3. Sand, Gravel and Rock are used ambiguously.
4. Applicant (Geneva) failed to provide evidence that the C-R zoned area was used for manufacturing prior to the zoning changes.

Appellants repeatedly argue that contracts, leases, maps, technical evidence provided (by Geneva) was (were) "incomplete, invalid, inconsistent, erroneous or fraudulent".

Appellants make much about the allegations that certain leases lack full signatures or lack "requisites" for recording or raise questions as to the appearance of date irregularities.

Appellants also repeatedly point out that rock blasting and mining are different than sand and gravel extraction.

Appellants reference the use of conveyors and the trucking in of materials for processing on-site.

Appellants additionally argue abandonment and wrongful expansion of the nonconforming use.

The "*flow*" of the documentation shows a chain of use by Geneva and Geneva's predecessors in title utilizing the property for a wide range of sand, gravel and rock extraction aspects over an extended number of years.

The property being initially in the unincorporated area of Salt Lake County and was unzoned until 1953 when the County first instituted and applied zoning to a portion of the subject property.

Draper City was incorporated in 1978.

Geneva acquired the fee title to the subject property in 1990.¹

Operative-Determinative Facts

1. First substantial documentation of sand, gravel and rock extraction on part of subject property evidenced in 1946 by Geneva's predecessors in title.
2. Additional evidencing of sand, gravel and rock extraction by Geneva's predecessors in title on substantial parts of subject property in 1947.
3. First application of Salt Lake County zoning to (part of) subject property occurred in 1953.
4. From 1953 to 1965 sand, gravel and rock extraction were a permitted use in the A-2 zone.
5. From 1965 to January 18, 1973 sand, gravel and rock extraction were a conditional use.

¹ Geneva having leased substantial parts of the real property as early as 1974. The 1990 fee title acquisition in large measure equating to subject 260 acres here at issue. SEE "**History**", pages 2-4, Zoning Administrator's June 24, 2016 *Interpretation Letter* for a relatively concise synopsis.

6. Sand, gravel and rock extraction was deleted as a conditional use in A-2 zone as of January 18, 1973.
7. Draper City was incorporated on February 22, 1978.
8. Draper City adopted the Salt Lake County Zoning Ordinance in 1978.

The property was initially out by itself on the fringes of populated areas.

As population has grown southward now the property is saddled up against larger and larger pockets of population.

The property was initially **unzoned**.

As indicated the subject real property once county zoning was applied in 1953 has an extensive zoning history under both Salt Lake County and presently Draper City.

The one constant though is that its basic and **continuous use** and purpose has revolved around sand, gravel and rock extraction.

Applying the mandates and direction of the referenced city code section as well as application of *Gibbons & Reed* the Zoning Administrator's interpretation is reasonable based on the evidence in the record.

For sure no lease or contract or overlay photograph is "*perfect*" and without concern and arguable question.

The leases and contracts though "*speak for themselves*". A reading of them shows a reasonably clear intent that the property was to be utilized for sand, gravel and rock extraction. Such utilization has been continuous and as evident ongoing today.

Appellants argue wrongful extension on one hand in both acreage and methodology.

The declarations of Wilford Clyde, Carl Clyde and Albert Schellenberg, individuals on the scene present a reasoned approach and intent regarding whole utilization of the property.

For sure the methods of sand, gravel and rock extraction are different to some or arguably to a large extent today in 2016 versus in 1946 when Hansen Lime and Stucco Company acquired the first 80 acres parcel.

Appellants on the other hand argue the granting of utility easements and or small fee title transactions indicate abandonment. Such "evidence" falls substantially short of abandonment.

While not unmindful of the concerns of the instant Appellants legally they have failed to prove their case from the evidence in the record that the Zoning Administrator's June 24, 2016 interpretation was not reasonable.

BASED ON THE ABOVE AND FOREGOING FINDINGS OF FACT and analysis the Presiding Officer enters the following:

CONCLUSIONS OF LAW

1. a. Draper City's June 24, 2016 "*Administrative Interpretation*" as to nonconforming use status of Geneva Rock Products, Inc.'s use of the referenced 260 acres real property located at the approximate address of 15547 Minuteman Drive, Draper, Utah 84020 must be accorded a presumption of correctness.

b. Appellants have failed to rebut such presumption of correctness.

2.a. Geneva should be determined to be maintaining a legally established nonconforming use of open land for sand, gravel and rock extraction operations on the 260 acres referenced in its May 9, 2016 request.

b. Geneva should be allowed to expand sand, gravel and rock extraction operations into open lands on the referenced 260 acres.

c. Crushing, concrete mixing, and batch plant operations should be determined to be a legal conforming use in the M-2 Zone and may continue without restriction regardless of whether material is obtained on-site, brought in by conveyor or brought in by truck on the referenced 260 acres.

3. Draper City's June 24, 2016 "*Administrative Interpretation*" as to nonconforming use status of Geneva Rock Products, Inc.'s use of the referenced 260 acres real property located at the approximate address of 15547 Minuteman Drive, Draper, Utah 84020 should be affirmed in its totality. (Section 9-5-180.D.4, DCC).

AND BASED ON THE ABOVE AND FOREGOING CONCLUSIONS OF LAW
the Appeals and Variance Hearing Officer enters the following:

ORDER

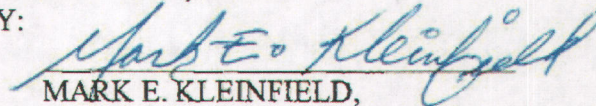
WHEREFORE, IT IS ORDERED that:

1. Draper City's June 24, 2016 "*Administrative Interpretation*" as to nonconforming use status of Geneva Rock Products, Inc.'s use of the referenced 260 acres real property located at the approximate address of 15547 Minuteman Drive, Draper, Utah 84020 is **affirmed in its totality**. (Section 9-5-180.D.4, DCC).

DATED and ENTERED this 6th day of September, 2016.

DRAPER CITY, UTAH

BY:



MARK E. KLEINFELD,
HEARING OFFICER
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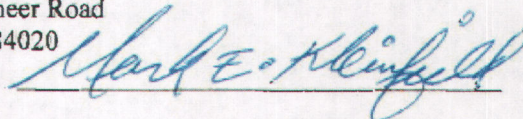
JUDICIAL REVIEW

As an "**Administrative Hearing**" judicial review of this Order may be obtained by filing a petition for plenary action for relief therefrom consistent with Draper City Code Section 9-4-050.H within thirty (30) days of the date of this Order with a court of competent jurisdiction.

CERTIFICATE OF MAILING

I hereby certify that on the 6th day of September, 2016 a true and correct copy of the above and foregoing **ORDER ON HEARING (Administrative Appeal Hearing)** was sent email and first class mail, postage prepaid to the following:

Keith Morey
Community Development Director/Zoning Administrator
Draper City
1020 East Pioneer Road
Draper, Utah 84020



DRAPER.AppealAPP.GenevaRock.09-xx-16